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No. 76-1443

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALLIED MEAT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. F-7 to F-4) is not officially reported. The decision and order of the National Labor Relations Board is reported at 220 NLRB 27 (Pet. App. D-1 to D-10), and the Board's decision upon reconsideration is reported at 221 NLRB 304 (Pet. App. E-1 to E-3).

JURISDICTION

The judgment of the court of appeals (Pet. App. F-5) was entered on January 24, 1977. The peti-

tion for a writ of certiorari was filed on April 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly declined to set aside a representation election based on the employer's claim that the union had guaranteed the employees a forty-hour workweek if it won the election.

2. Whether in the circumstances of this case the Board reasonably applied its rules regarding the conduct at hearings of Regional Office representatives and the disposition of matters by summary judgment.

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158(a)), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. On November 1, 1973, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, filed a representation petition seeking certification as the exclusive bargaining agent of

petitioner's production and maintenance employees (R. 511).[1] On November 30, 1973, the Regional Director of the National Labor Relations Board conducted an election among the employees, in which 13 votes were cast for the Union, 13 votes were cast against it, and one ballot was challenged (R. 514). The Union then filed timely objections to the election, alleging, *inter alia,* that petitioner had intimidated employees prior to the election (objection 2), and had granted wage increases subsequent to the filing of the election petition (objection 3) (R. 516).[2] The Regional Director's administrative investigation disclosed with respect to objection 2 that three employees alleged that they were threatened or interrogated by petitioner. It disclosed with respect to objection 3 that wage increases were granted to seven of the 26 eligible voters effective November 12, 1973, but petitioner asserted that each increase was awarded at that time because of factors other than the imminent election (R. 518–520). In order to resolve the conflicts in the evidence, the Regional Director ordered that a hearing be held before a Hearing Officer (R. 520–521).[3]

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[1] "R." refers to the record in the court of appeals, a copy of relevant portions of which has been lodged with the Clerk of this Court.

[2] Four additional objections to the election were withdrawn by the Union (R. 517).

[3] The Regional Director also sustained the ballot challenge on the ground that petitioner had discharged the voter prior to the election (R. 518).

After the five days of hearings, the Hearing Officer issued his report, finding that petitioner had not threatened or interrogated employees as alleged in objection 2, that the timing of two of the seven wage increases was mandated by pre-hire agreements, but that the justifications proferred by petitioner for the remaining five wage increases were inadequate to rebut the inference that they were timed to influence votes in the election (R. 525–536). Accordingly, he recommended that objection 2 be overruled, that objection 3 be sustained, and that the election be set aside (R. 536). Petitioner filed timely exceptions to the Hearing Officer's report (R. 537–541), and, on August 28, 1974, the Board adopted the Hearing Officer's recommendations, set aside the first election, and directed that a second election be conducted (Pet. App. A–1 to A–6).[4]

Pursuant to the Board's order, a second election was held among petitioner's employees on October 18, 1974, in which 19 votes were cast for the Union, 4 votes were cast against the Union, and one vote was challenged (R. 565). Petitioner filed timely objections to the election, alleging, *inter alia,* that the Union had made material misrepresentations of fact to the employees which petitioner had no opportunity to rebut

[4] Chairman Miller disagreed with the Hearing Officer's conclusion that wage increases granted to two of the five employees interfered with the election, but he agreed that the remaining three increases did interfere, and he concurred in setting the election aside (Pet. App. A–4, n. 4).

(R. 567).[5] Based on an administrative investigation, the Acting Regional Director recommended that each of petitioner's objections to the election be overruled. He found, *inter alia,* that the only misrepresentation alleged by petitioner was a "guarantee" by the Union to obtain a forty-hour workweek for the employees if it were selected, that this allegation was denied by the Union and was not supported by employee witnesses, and that, in any event, the "guarantee" was one which the Union was in no position to fulfill (Pet. App. B–1 to B–4). Petitioner filed timely exceptions to the Acting Regional Director's report, and, on February 27, 1975, the Board adopted the Acting Regional Director's recommendations and certified the Union as the exclusive bargaining representative for petitioner's maintenance and production employees (Pet. App. C–1 to C–2).

Petitioner continued to refuse to bargain, and the Union filed an unfair labor practice charge with the Board. On April 30, 1975, the Regional Director issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (R. 583–587). When petitioner filed its answer again challenging the validity of the certification, counsel for the General Counsel moved the Board for summary judgment on the ground that all matters raised by petitioner had previously been raised and rejected in the representation pro-

[5] Petitioner's four additional objections, all of which were overruled by the Board, have not been reasserted in this Court.

ceeding. The Board issued a notice to show cause why summary judgment should not be granted.

On August 28, 1975, upon finding that petitioner had not filed a response to the notice to show cause (Pet. App. D–3), the Board granted summary judgment. It concluded that petitioner had violated Section 8(a)(5) and (1) of the Act, and ordered petitioner to bargain with the Union upon request (Pet. App. D–1 to D–10).

Petitioner then filed a motion for reconsideration, claiming that it had in fact responded to the notice to show cause (see Pet. Opp. E–1). On November 3, 1975, the Board granted the motion for reconsideration, considered and rejected each contention made in petitioner's response to the notice to show cause, and reaffirmed its original decision and order (Pet. App. E–1 to E–3).

2. The court of appeals enforced the Board's order. It concluded, *inter alia,* that the "Hearing Officer does not appear to have been prejudiced or biased in the conduct of the hearing" on the objections to the first election, that petitioner's response to the notice to show cause "contained nothing which made a factual hearing unnecessary," and that petitioner's objections to the second election "lacked the necessary strength" to require an evidentiary hearing since "such hearings are necessary if the issues raised are insubstantial" (Pet. App. F–1 to F–4).

ARGUMENT

1. The Board was correct in rejecting petitioner's objection to the second election based upon the Union's alleged "guarantee" to obtain a forty-hour workweek if it was chosen by the employees. Such promises to obtain increased benefits for the employees are commonplace in an election campaign, and, since the employees are aware that the union has no power to fulfill them except through bargaining, they uniformly have been held not to constitute a misrepresentation which would tend to interfere with employee free choice. See *National Labor Relations Board* v. *Gilmore Industries, Inc.,* 341 F. 2d 240, 242 (C.A. 6); *National Labor Relations Board* v. *Golden Age Beverage Co.,* 415 F. 2d 26, 28, 30 (C.A. 5); *Olson Rug Co.* v. *National Labor Relations Board,* 260 F. 2d 255, 257 (C.A. 7); *Wilson Athletic Goods Mfg. Co.* v. *National Labor Relations Board,* 164 F. 2d 637, 639–640 (C.A. 7). See also, *National Labor Relations Board* v. *Sauk Valley Mfg. Co.,* 486 F. 2d 1127, 1131 (C.A. 9).[6]

[6] Neither *Cross Bakery Co.* v. *National Labor Relations Board,* 453 F. 2d 1346 (C.A. 1), nor *Walled Lake Door Co.* v. *National Labor Relations Board,* 472 F. 2d 1010 (C.A. 5), relied upon by petitioner to establish a conflict among the circuits (Pet. 7), involved a similar campaign promise. In each of those cases the union was found to have misrepresented an existing fact, the amount of a wage increase obtained at another plant and the number of the employer's plants which had already been unionized, respectively. No such misrepresentation of existing facts was alleged in the instant case. The other cases cited by petitioner (Pet. 7–8) are similarly inapposite.

Contrary to petitioner's assertion (Pet. 6–7), moreover, the Board did not apply a double standard in determining that a hearing should be held on the Union's objections to the first election, while denying a hearing on petitioner's objection to the second election. The Union's objections raised substantial and material factual issues, which, if resolved in the Union's favor (as they were), would be sufficient to overturn the election; moreover, they were supported by direct evidence (R. 519–520). With respect to the second election, on the other hand, petitioner submitted only "equivocal hearsay" (*United States Rubber Co.* v. *National Labor Relations Board,* 373 F. 2d 602, 606 (C.A. 5)) in support of an objection (R. 577) that, as explained *supra,* was legally insufficient even if proved.

2. Petitioner's remaining contentions also lack merit. Petitioner asserts first that the Hearing Officer failed to require the Regional Director's representative to conform to the impartiality requirements of the Board's Field Manual during the hearing on objections to the first election (Pet. 3–4, 8). However, the Board, after reviewing the record, was "not persuaded that the conduct of the Regional Director's representative exhibited lack of impartiality in violation of the Agency's Field Manual or otherwise" (Pet. App. A–3, n. 2). Rather, the Board found that the representative, in examining witnesses and introducing evidence, was merely performing his proper

function of insuring that "a complete record was made upon which the Hearing Officer, and eventually the Board, would be able to render their considered opinions" (*ibid.*). Morever, as the court below found, the Hearing Officer, who alone had decisional power, "does not appear to have been prejudiced or biased in the conduct of the hearing" (Pet. App. F–3).[7]

Petitioner next asserts that the Board should have refused to grant summary judgment in the unfair labor practice proceeding because the motion for summary judgment was allegedly filed too late under the Board's rules (Pet. 5, 8). However, the rule relied upon by petitioner provides only that such motions shall be "filed promptly and within such time as not to delay the proceeding" (Pet. App. H–1). The motion for summary judgment was filed on June 12, 1975 (R. 593), one month after petitioner filed its answer to the unfair labor practice complaint (R. 590). The Board, construing its flexible rule in light of the circumstances of this case, properly held that the filing of the motion "was not unreasonably delayed after the Respondent had filed its answer to the complaint"

[7] The Regional Director's representative's alleged remark about petitioner's counsel's lack of ethics (Pet. 3–4) was made off the record, out of the hearing of the Hearing Officer, who first heard about it when petitioner's counsel stated his version of the conversation on the record (Pet. App. A–3, n. 2.) Accordingly, the Board properly concluded that "the Hearing Officer could not have been influenced by the incident in making his rulings and recommendations herein" (*ibid.*).

(Pet. E–2). In any event, since, as the court below found, petitioner's response "contained nothing which made a factual hearing necessary" (Pet. App. F–3), petitioner's case could not have been prejudiced by the Board's decision to grant summary judgment.

Petitioner's final contention is that the Board refused to consider its response to the notice to show cause (Pet. 8–9). Admittedly, the Board had not received petitioner's response when it issued its original decision and order.* But, when petitioner brought its response to the Board's attention, the Board promptly reconsidered the case in light thereof, and specifically responded to each of petitioner's contentions before reaffirming its decision (Pet. App. E–1 to E–3). As the court of appeals found, petitioner's contentions were thus given "full consideration" (Pet. App. F–3).

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*Contrary to petitioner's contention (Pet. 6), the file stamp on petitioner's response (R. 595) shows that it was filed with the Division of [Administrative Law] Judges, rather than with the Board itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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